International Human Rights and the High Court of Australia

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INTRODUCTION: THE INTERNATIONALISATION OF AUSTRALIAN LAW

In years gone by, international law has represented somewhat of an unknown landscape for Australian lawyers, whether they be practitioners, academics or judges. Recent decisions of the High Court of Australia suggest, though, that a good working knowledge of international law is becoming a prerequisite for domestic (as well as international) lawyering. While the purport of these decisions is still somewhat vague, there remains little doubt that in years to come Australian lawyers will need to know something about the basic tenets of international law. In light of this nascent internationalisation of Australian law, an onus rests upon law teachers in this the 'decade of international law', to educate Australian lawyers about international law, through law schools and journals, amongst other things.

The purpose of this article is to analyse a number of recent cases (particularly *Dietrich v The Queen*[1]), in order to provide an understanding of the relevance of human rights (founded in international law) to the judicial law-making function of the High Court. To this extent the article represents a modest attempt to educate Australian lawyers about the

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1 (1992) 177 CLR 292.

importance of international initiatives regarding human rights to our principles of constitutionalism. This is a topic that animates courts throughout the common law world and is one that highlights the tension that international law creates when it seeks to enter the realm of the 'local'. Recent events emanating from Nick Toonen's 'communication'[2] to the United Nations Human Rights Committee suggest that many Australians are sensitive about non-Australians resolving issues which go to the very heart of Australian constitutionalism (i.e. the way we constitute). This article seeks to avoid such a concern by examining how Australian courts can legitimately undertake the role of transforming international human rights into our principles of constitutionalism.

INTERNATIONAL LAW IN AUSTRALIA

The most obvious way to introduce a discussion about the internationalisation of Australian law is to define the way in which Australian law has, up until now, managed and received influence from the international arena.

Article 38 of the *Statute of the International Court of Justice* provides that the International Court of Justice (ICJ) in adjudicating disputes shall apply (have resort to): *treaty or conventional law, customary international law, general principles of law recognised by civilised nations and judicial decisions and the writings of eminent publicists.* This directive to the ICJ has traditionally been regarded as an authoritative summary of the sources of international law. The focus of this article is on international human rights as evidenced in treaty or custom, and the way in which those sources of international law impact upon adjudication in our domestic courts. How, then, does Australian law deal with treaties and customary international law?

Treaties

International treaties between states, and states and other subjects of international law,[3] contain rights and duties enforceable by the contracting parties at an international level. The traditional approach is that such treaties cannot be regarded as municipal law until there is domestic legislation implementing their rights and duties in the form of domestic

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[2] Communication No. 488/1992. This concerned the Tasmanian criminal laws relating to sodomy.

[3] For example, international institutions like the United Nations. The principal instrument governing treaties between states is the *Vienna Convention on the Law of Treaties 1969* which entered into force on 27 January 1980. This treaty does not cover agreements between states and other subjects of international law or between such other subjects: Art. 3.

law.[4] The domestic implementation of a treaty through legislation means that individuals (as opposed to states) can use domestic courts to enforce the domesticated version of the agreement. The further question as to whether an unimplemented treaty can be applied in domestic adjudication is in large part the subject of this article.[5]

The negotiation, signing and ratification of an international treaty is the responsibility of the Executive Government of the Commonwealth. This power has been attributed by most to s. 61 of the Australian Constitution,[6] which is said to incorporate the Royal Prerogative to enter treaties. The implementation of treaties in Australian domestic law is seen to be within the power of the Commonwealth Government,[7] although the domestic means of achieving the international ends must display 'reasonable proportionality'.[8]

Customary International Law

Customary international law provides another source of binding international norms. Since the 19th century, customary international law has been established, evidenced, defined and manifested through state practice and *opinio juris*.[9] State practice is externally observable behaviour from

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4 *The Parlement Belge* (1879) 4 PD 129; W. Holdsworth, 'Treaty Making Power of the Crown' (1942) 58 LQR 132; *Simsek v MacPhee* (1982) 148 CLR 636, 641–2; *Dietrich v The Queen* (1992) 177 CLR 292; *Chu Kheng Lim v Minister for Immigration Local Government and Ethnic Affairs* (1992) 176 CLR 1. As far as the Executive is concerned, this approach has recently been questioned, if not impliedly rejected: *Teoh v Minister for Immigration, Local Government and Ethnic Affairs* (1994) 121 ALR 436, 449, 466. For a description of the position in the United States, where self-executing treaties are part of the law of the land, see A. Bayefsky and J. Fitzpatrick, 'International Human Rights Law in United States Courts: A Comparative Perspective' (1992) 14 *Michigan Journal of International Law* 1, 41 ff.

5 For an analysis of the way unimplemented treaties are used in domestic legal reasoning in the UK and Canada, see Bayefsky and Fitzpatrick, *supra* n. 4 at 53 ff.

6 *Barton v Commonwealth* (1974) 131 CLR 477, 498; *Victoria v Commonwealth* (1975) 134 CLR 338, 405–6; *New South Wales v Commonwealth* (1975) 135 CLR 337, 373; *Koowarta v Bjelke-Petersen* (1983) 153 CLR 168, 212; Sir Anthony Mason, 'The Australian Constitution 1901–1988' (1988) 62 ALJ 752, 754; H.V. Evatt, *The Royal Prerogative* (Sydney: Law Book Co., 1987), ch. XVII; L. Zines, *The High Court and the Constitution* (3rd ed., Sydney: Butterworths, 1992), 235; cf. P. Lane, *Australian Federal System* (2nd ed., Sydney: Law Book Co., 1979), 429–30; *Commonwealth v Tasmania* (1984) 158 CLR 1, 298–300.

7 *Richardson v Forestry Commission* (1988) 164 CLR 261.

8 See Deane J in *Richardson Forestry Commission* (1988) 164 CLR 261, 311, cf. Mason CJ and Brennan J at 296. On this topic generally, see B. Fitzgerald, 'Proportionality and Australian Constitutionalism' (1993) 12 *University of Tasmania Law Journal* 363. Deane J clearly envisages s. 51(xxix) as a core power that is at times purposive and at other times non-purposive. In its purposive treaty implementation aspect, s. 51(xxix) demands proportionality. Although Deane J relies heavily on a previous judgment of Dixon J, it cannot be denied that Deane J has reconstructed s. 51(xxix) in a discourse of purpose and proportionality.

9 This two-dimensional approach to customary international law was given judicial confirmation in the *North Sea Continental Shelf Cases* (1969) *ICJ Reports* 44 and *Nicaragua v United States of America* (1986) *ICJ Reports* 14. See a review of this approach in H. Charlesworth, 'Customary International Law and the Nicaragua Case' 11 *Australian Year Book of International Law* 1.

which inferences can be drawn.[10] *Opinio juris* is the psychological commitment a state is said to exhibit when it treats a customary norm as binding in a legal sense.[11]

The use of customary international law in domestic litigation has been the subject of much debate. One side of the argument is that customary international law without more is 'incorporated' into domestic law only being overridden by statute; this is the so-called monist view. The other side of the argument is that customary international law must be 'transformed' into domestic law; the so-termed dualist approach.[12] English authorities tend to suggest that customary international law can be utilised, without more, in domestic litigation.[13] Australian authorities, on the other hand, indicate a preference for the dualist-style view that customary international law is a 'source' of the common law,[14] thus requiring the judiciary to transform it into domestic law.

Soft Law

It would be both ignorant and misleading, though, to leave the story of sources of international law described simply in terms of treaty and custom. For international relations have seen the rise of 'soft law';[15] a (conventional or customary) legal or non-legal norm which is more advisory or guiding, than directive. Soft law has arisen as the flexible mechanism through which international objectives can be achieved by diverse cultures on diverse issues. The approach is to generate initiatives through guiding principles which are not binding in any strict sense. It is

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[10] Martii Koskenniemi, a Finnish international jurist, has described the use of state practice as a product of materialism: M. Koskenniemi, 'The Normative Force of Habit: International Custom and Social Theory' (1990) 1 *Finnish Yearbook of International Law* 77.

[11] *The Psychological Element:* If state practice were the sole criterion in the establishment of customary law, then objectivity would dictate some less than desirable norms. For instance, many states may follow a particular practice because they fear a powerful state. To label this as law raises issues that legal philosophers in the domestic setting found disquieting. For people like H.L.A. Hart, the great liberation from John Austin's philosophy of law was in realising that law did not equal coerced compliance with a command. Spurred on by the happenings in Nazi Germany, Hart was keen to draw more attention to the psychological acceptance of law as opposed to the coercion of power. *Opinio juris* plays much the same role in international law in that it provides an internal/subjective criterion of what is law: Koskenniemi, *supra* n. 10.

[12] J.G. Starke, 'Monism and Dualism in the Theory of International Law' (1936) 17 BYBIL 66.

[13] W. Blackstone, 4 *Commentaries on the Laws of England* (1809), 67; *Triquet v Bath* 3 Burr. 1487 (Lord Mansfield); *Trendtex Trading Corp. v Central Bank of Nigeria* [1977] QB 529; I. Brownlie, *Principles of International Law* (4th ed., Oxford: Oxford University Press, 1990). The position seems much the same in the United States: Bayefsky and Fitzpatrick, *supra* n. 4 at 5. The likelihood of adopted customary international law being used to further domestic human rights litigation in the UK is doubted by Bayefsky and Fitzpatrick: at 35–41.

[14] *Chow Hung Ching v The King* (1948) 77 CLR 449, especially Dixon J at 477.

[15] See C. Chinkin, 'The Challenge of Soft Law: Development and Change in International Law' (1989) ICLQ 851.

uncertain how the softness of any international norm, legal or non-legal, will impact on domestic implementation other than to say that the softer and less binding a norm, the more reluctant judges will be in using it to justify their legal reasoning. On the other hand, as our domestic system moves into an era of Dworkian principles as opposed to positivist rules,[16] it might be the case that judges both internationally and domestically draw inspiration and vision from the principles generated by soft law.

Much of international human rights law is 'hard' as opposed to 'soft' law, and therefore the centre of discussion in this article is international law as dictated by treaty or custom. Treaty and custom are, without more, seen as part of international law and not domestic law. The purpose of this article is to look at the way these pieces of international law (which are yet to be transformed into domestic law) influence domestic legal reasoning and judicial law-making.

RECENT APPROACHES TO INTERNATIONAL LAW BY THE HIGH COURT

International human rights are primarily contained in treaties, and therefore when domestic courts are confronted with an international human rights claim they tend to look to their domestic law on the status of treaties to resolve the problem. However, it is a principle of international law that an article of a treaty, which is accepted and practised as law by a state, can evidence customary international law. Such a distinction becomes important in a jurisdiction like that of the UK, where unimplemented treaties (unlike customary international law) are not, without more, part of the law of the land. Although custom may only be a 'source' of domestic law in Australia, it would seem sensible for the courts to delineate whether they are applying the international principle as one of customary or unimplemented treaty law. In the future, the relevance of the distinction might subside if both forms of international law come to be seen as sources of domestic common law. At this stage, the High Court of Australia approaches international human rights as more a question of an unimplemented treaty than as one of customary international law and thus the following analysis is rooted firmly in the context of unimplemented treaties.

[16] For use of a Dworkian principles discourse by Mason CJ, Deane, Toohey and Gaudron JJ, see the free speech cases: *ACTV Pty Ltd v Commonwealth* (1992) 177 CLR 106 and *Nationwide News Pty Ltd v Wills* (1992) 177 CLR 1. Trevor Allan's *Law Liberty and Justice* (Oxford: Oxford University Press, 1993) is an example of a recent academic writing advocating a constitutional law underpinned by Dworkian principles. cf. W. Rich, 'Approaches to Constitutional Interpretation in Australia: an American Perspective' (1993) 12 *University of Tasmania Law Review* 150, 171–5.

Dietrich v The Queen

The recent decision of *Dietrich v The Queen*[17] is the most significant statement by the High Court of Australia on the internationalisation of the Australian legal system. In that case, the High Court displayed a willingness to resort to international law (meaning law that had not been domesticated in any way) for guidance in clarifying common law.

In *Dietrich* the applicant, who had been tried and convicted of a serious criminal offence without legal representation, applied for special leave to appeal to the High Court on the ground that the Supreme Court of Victoria had erred in law in holding that the applicant did not have a right to be provided with legal counsel at public expense. Before the High Court, this issue resolved itself into a question of whether the accused had been denied his right to a fair trial.[18] The majority of judges suggested that the applicant's claim to hold a *right to* be provided with counsel at public expense was not an issue which the court could determine, as it was predominantly a political question for the Executive and legislature to solve.[19] However, what the High Court could adjudicate upon, and lack of counsel could impact upon, was the accused's right to a fair trial.

The Legal Reasoning

The key issues raised were whether Dietrich had:

1. a right to counsel as part of the right to a fair trial regardless of the circumstances of his case — the acontextual approach; or
2. a right to counsel as part of the right to a fair trial because of the circumstances of his case — the context-dependent approach; and if so was the actual trial of Dietrich unfair?

Mason CJ and McHugh J clearly expressed the view that the mere fact that an accused was unrepresented in a criminal trial did not automatically mean the trial was unfair.[20] However, they were willing to concede that the trial of an unrepresented accused could create 'unfairness' in a particular instance. In this sense, they rejected the general proposition that lack of counsel created unfairness in every case, in favour of a more

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[17] (1992) 177 CLR 292.

[18] *Id.* 301 per Mason CJ and McHugh J, 330 per Deane J, 361 per Toohey J, and 365 per Gaudron J. Such a right was established in *Jago v District Court (NSW)* (1989) 168 CLR 23; and in *Dietrich* for Deane J at 326 and Gaudron J at 362 ff. Such right is entrenched in Chapter III of the Constitution, where the judicial power of the Commonwealth is being exercised.

[19] (1992) 177 CLR 292, 330–1 per Deane J, 357 per Toohey J, and 365 per Gaudron J. Such a proposition is not expressly asserted by Mason CJ and McHugh J, but it does seem to underlie their approach.

[20] *Id.* 311.

context-dependent notion that lack of counsel was only relevant if unfairness could actually be shown.[21] If unfairness was likely to occur, they said, the trial should be adjourned until counsel is secured. Mason CJ and McHugh J held that Dietrich's trial, in which he had no legal representation, was in light of all the circumstances, unfair.

Brennan J, on the other hand, argued that the right to counsel, whether described in terms of a 'right' to counsel, or as a general proposition that the trial judge is bound in all cases to adjourn, had as its underlying premise the notion that entitlement to legal aid is essential to a fair trial.[22] This he found to be an unacceptable proposition of law, for it was the executive and legislature that must determine the entitlement to legal aid.[23] Brennan J considered that the actual circumstances of Dietrich's trial had not been raised on appeal and thus he refused to adjudicate upon that matter. Dawson J followed a similar line of reasoning to Brennan J.[24]

Deane J, in supporting the acontextual approach, was adamant that 'unfairness' would arise where an accused was tried for a serious criminal offence without legal representation in all but exceptional circumstances.[25] In essence, Deane J espoused a right to counsel at public expense as an inherent attribute of the right to a fair trial. In this regard, Deane J distinguishes himself from the other majority judges, because he sees in lack of representation a presumption of unfairness, while the others see it only as an indicia of unfairness to be considered in the circumstances of the case. The Deane J approach sits well with some of the ideas of poststructuralism. It is clear that Deane J envisaged the criminal trial as a type of discourse through which an untrained accused could not hope to communicate. The other judges could not accept such an approach. Deane J, in relying on the general proposition to found unfairness, said there was no need to look at the actual conduct of Dietrich's trial.

Toohey[26] and Gaudron JJ,[27] in separate judgments, seem to suggest like Mason CJ and McHugh J, that lack of legal representation is something that must be weighed up in looking at the circumstances of the particular trial. Although Gaudron J's approach is similar to that of Deane J's, she moves closer to the other majority judges by analysing the facts of the particular case; something Gaudron J felt compelled to do by s. 598 of the *Crimes Act 1958* (Vic.).[28] Both Justices, on looking at the circumstances at hand, considered that the conduct of Dietrich's trial had been unfair.

It is pertinent for the purposes of this article to note that the domestic law on whether an accused had a right to counsel at public expense was uncertain, and as the High Court held they were not bound by any earlier

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[21] *Id.* 301, 311–12.
[22] *Id.* 318.
[23] *Id.* 323–5.
[24] *Id.* 349–50.
[25] *Id.* 335.
[26] *Id.* 361–2.
[27] *Id.* 374–6.
[28] *Id.* 374–5. Deane J (at 337–8) had rejected the operation of the proviso to s. 598.

cases. The High Court decision of *McInnis v The Queen*,[29] which had concerned the legality of a trial judge's refusal to grant an adjournment so that an accused could secure legal representation, was skilfully distinguished by a majority of judges.[30] On the other hand, Dawson J applied the case as precedent for the proposition that an accused has no right to counsel at public expense,[31] while Gaudron J resolved to overrule *McInnis*.[32] In essence, the court (Brennan and Dawson JJ excepted) in *Dietrich* acknowledged that a right to a fair trial could be dependent on legal representation at public expense. This was a much more liberal approach than that of Barwick CJ and Mason J (as he then was) in *McInnis*,[33] who had categorically denied the right to counsel at public expense.[34]

The final order in *Dietrich* (Brennan and Dawson JJ agreeing to the grant of special leave but otherwise dissenting) was that special leave to appeal should be granted, the appeal allowed, the conviction set aside and a new trial ordered. The interesting issue, then, is: what role did international law play in resolving the case?

The Relevance of International Law

In asserting that a right to counsel at public expense (which the court interpreted to mean a general/acontextual proposition relating to the right to a fair trial) was part of the law of Australia, counsel for the applicant referred to, amongst other things, Article 14(3)(d) of the *International Covenant on Civil and Political Rights* (*ICCPR*).[35] The article provides that in the determination of a criminal charge, everyone shall be entitled to, amongst other things, the right to 'have legal assistance assigned to him, in any case where the interests of justice so require, and without payment by him in any such case if he does not have sufficient means to pay for it'.

Counsel for the applicant argued that the common law should be developed in a way which recognises the existence and enforceability of rights contained in international instruments to which Australia was a party. The international instrument in this case, the *ICCPR*, had been signed and ratified by Australia, yet it had not been fully implemented in

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[29] (1979) 143 CLR 575.

[30] *Dietrich v The Queen* (1992) 177 CLR 292, 303 per Mason CJ and McHugh J, 331 per Deane J, and 354–5 per Toohey J. Toohey J (at 355) expressed the view that the philosophy underlying the majority approach in *McInnis v The Queen* (1979) 143 CLR 575 was 'inimical ... to the argument that there is a right to counsel at public expense'.

[31] (1992) 177 CLR 292.

[32] *Id.* 371–4.

[33] *McInnis v The Queen* (1979) 143 CLR 575, 579 per Barwick CJ, and 581 per Mason J. cf. Murphy J at 583.

[34] As Deane J notes ((1992) 177 CLR 292, 331), the *McInnis* decision was decided prior to the High Court's development of the notion of a right to a fair trial.

[35] Australia signed this instrument on 18 December 1972 and ratified it on 13 August 1980. Australia's accession to the *First Optional Protocol to the ICCPR* is effective from 25 December 1991.

a domestic sense.[36] The Justices of the High Court did not seem to determine whether Article 14(3)(d) of the *ICCPR* evidenced customary international law. Hence their reasonings were directed towards the situation where an international instrument has not been implemented.[37] Such an instrument, as has been suggested, should not be adopted by the courts as domestic law without domestic legislative implementation.[38] The issue in this case, then, was as to what influence non-domesticated international law (in the form of an unimplemented treaty) could have on domestic adjudication.

The Judicial Approaches to International Law

Mason CJ and McHugh J responded to counsel's argument that our common law should be consistent with our international obligations by saying:

> Ratification of the ICCPR as an executive act has no direct legal effect upon domestic law; the rights and obligations contained in the ICCPR are not incorporated into Australian law unless and until specific legislation is passed implementing the provisions.[39]

Mason CJ and McHugh J clarified this statement by acknowledging that English courts presume Parliament intends to legislate in accordance with its international obligations and that English courts may also have resort to international obligations in order to help resolve uncertainty or ambiguity in judge-made law.[40] They said, assuming (without

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[36] On the degree to which the *ICCPR* has been implemented domestically, see *Dietrich v The Queen* (1992) 177 CLR 292, 305–6 per Mason CJ and McHugh J, 360 per Toohey J; and Einfeld J in *Minister for Foreign Affairs and Trade v Magno* (1992) 112 ALR 529, 569–74. Note the accession to the *First Optional Protocol ICCPR* which gives individuals rights, after exhaustion of local remedies, of communication with the (international) Human Rights Committee who can then advise the individual, the state concerned and the UN General Assembly through the Committee's annual report of their findings: H. Charlesworth, 'Australia's Accession to the First Optional Protocol to the ICCPR' (1991) 18 MULR 428.

[37] It appears that the majority of judges saw Australia's ratification of the instrument as the important issue: *Dietrich v The Queen* (1992) 177 CLR 292, 306 per Mason CJ and McHugh J, 321 per Brennan J, 337 per Deane J, 359–60 per Toohey J and 373 per Gaudron J.

[38] Stephen J in *Simsek v McPhee* (1982) 148 CLR 636; *J.H. Rayner (Mincing Lane) Ltd v Department of Trade and Industry* [1988] 3 WLR 1033 and on appeal [1989] 3 WLR 969; although use of unimplemented treaties to aid statutory interpretation would not be to use the treaty as domestic law: G. Triggs, 'Customary International Law and Australian Law'. In M.P. Ellinghaus, A.J. Bradbrooke and A.J. Duggan (eds), *The Emergence of Australian Law* (Sydney: Butterworths, 1989), 376, 381. On the legitimate use of such a treaty in interpreting domestic statutes, see Gummow J in *Minister for Foreign Affairs v Magno* (1992) 112 ALR 529, 534–5.

[39] (1992) 177 CLR 292, 305. In *Re Limbo* (1990) 64 ALJR 241, Brennan J adhered strictly to the view that international human rights are not enforceable before domestic courts until they have been implemented into the domestic legal system.

[40] (1992) 177 CLR 292, 306.

deciding) the same approach were to be taken in Australia, the applicant was not asking for an ambiguity or uncertainty in the common law to be resolved but for a new right to be recognised and therefore the English approach was not relevant. Further, they said the applicant's case was no further advanced by relying on Article 14(3)(d), as this provision only became applicable in circumstances where the 'interests of justice' required legal representation. Their Honours saw this as amounting to little more than the requirement that an accused be tried fairly (as currently understood).[41]

Mason CJ and McHugh J found that the lack of legal representation was only relevant when, after considering the facts of the case at hand, it was clear a trial without representation was unfair. In coming to this formulation or explication of the right to a fair trial, there is little doubt that Mason CJ and McHugh J were mindful of, if not substantially influenced by, the *ICCPR* (and the similarly worded *European Convention for the Protection of Human Rights and Fundamental Freedoms* (*ECHR*)).[42] This raises the question as to whether they were using international law to explicate the existing common law or to introduce a 'new principle', albeit one subsumed under the general notion of a fair trial. It could be suggested that these two judges saw the need to adjourn a trial where lack of representation generated unfairness, as being inherent in the existing principle of a fair trial even though it had not yet been clearly formulated, and thus they appeared to use international law to remove an uncertainty in something already existing. On the other hand, they seemed to say that a principle providing that lack of representation created the presumption of an unfair trial was such a new aspect of the fair trial principle that it could not be developed through use of international law, as international law could only be used to perfect what already existed.[43] Such a distinction is hard to maintain.

Brennan J, whose judgment in this case is a classic statement of the law-making function of judges in deciding common law cases, concluded that although the *ICCPR* was not part of our municipal law, it was a 'legitimate influence on the development of the common law'.[44] He said:

> Indeed it is incongruous that Australia should adhere to the Covenant containing that provision unless Australian Courts recognise the entitlement and Australian governments provide the resources required to carry that entitlement into effect. But the courts cannot, independently of the legislature and the executive, legitimately declare an entitlement to legal aid.[45]

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[41] *Ibid.*
[42] *Id.* 300, 306–7.
[43] *Id.* 306, where the distinction between perfecting the pre-existing and introducing a new concept is raised.
[44] *Id.* 321.
[45] *Ibid.*

Deane J, as usual paying the greatest attention to the justice of our criminal system, appeared to adopt the view that the *ICCPR* was influential in determining that the common law principle of a right to a fair trial had been breached. It is impossible to say what weighting Deane J would have given the International Covenant if it were the only justification for claiming the accused's right to a fair trial had been denied.[46] Remembering that Deane J held that lack of representation created an acontextual presumption of unfairness, and that Mason CJ and McHugh J labelled such a principle of law 'a right ... never ... recognised ... to date',[47] it is pertinent to ask whether the latter two judges would regard Deane J as using international law to import a new principle of common law?[48]

Dawson J, on the other hand, made no firm commitment as to the use of international law in domestic adjudication but hinted that he would take a similar approach to the English cases.[49]

Toohey J, in similar fashion to Mason CJ and McHugh J, suggested that where the common law was unclear, 'an international instrument may be used by a court as a guide to that law'. Toohey J left open the point as to whether an international instrument could be used to fill a gap in the domestic law.[50] Even if international law could be used to fill gaps, Toohey J considered that the *ICCPR* did not support a Deane-type presumption of unfairness in all cases, and like Mason CJ and McHugh J pointed to the fact that Article 14(3)(d) was context-dependent in that it invoked a criterion of 'where the interest of justice require'.[51]

Gaudron J, while giving little attention to the legitimate use of international law, appeared to use Australia's obligations under the *ICCPR* as one among a number of justifications (or sub-justifications) for overruling the earlier High Court decision of *McInnis* (which had denied the existence of any right to counsel at public expense) and as an indicator of what the new principle should be.[52]

These pronouncements, while only brief, are the most extensive the High Court (as a whole) has offered. There have been other recent pronouncements which also give an indication of how the High Court perceives the influence of international law.

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[46] *Id.* 337. Deane J referred to other domestic factors along with the *ICCPR*.
[47] *Id.* 306.
[48] *Id.* 349. Dawson J labels such an approach as not resolving ambiguity or uncertainty but introducing fundamental change.
[49] *Id.* 349.
[50] *Id.* 360–1.
[51] *Ibid.*
[52] *Id.* 372 ff.

Lim

In *Chu Kheng Lim v Minister for Immigration*,[53] Brennan, Deane and Dawson JJ held that the unambiguous words of Division 4B of the *Migration Act 1958* (Cth) must be given effect even though they may conflict with Australia's international obligations under the *ICCPR* and the *Refugee Convention and Protocol*. Their Honours did, however, concede that in a case of ambiguity, courts should favour a construction of a Commonwealth statute that accords with the obligations of Australia under an international treaty.[54]

Mabo

In *Mabo v Queensland (No. 2)* Brennan J, in a seminal statement (with which Mason CJ and McHugh J concurred), said that 'the common law does not necessarily conform with international law, but international law is a legitimate and important influence on the development of the common law, especially when international law declares the existence of universal human rights'[55]. In *Mabo*, Brennan J appeared to use the process now open to Australians under the Optional Protocol to the *ICCPR* as well as the *ICCPR* as a justification for overruling the common law principle of 'broad *terra nullius*' and replacing it with a common law principle[56] recognising to some extent indigenous people's rights.[57] It must be noted that Brennan J seems to use international human rights as something with which to compare and evaluate what he perceived as the current Australian common law, rather than as the generators of Australian common law. Nonetheless, his intention to utilise international human rights in developing common law is clear.

In summary, *Dietrich* represents the most concerted effort by the High Court to confront the issue of globalisation of the Australian legal system, especially in the context of constitutional law and, in particular, human rights. Brennan J's judgment in *Mabo*, while only briefly referring to the legitimacy of international law influencing domestic adjudication, has and promises even more so to become a touchstone for a globally aware common law.[58] Kirby P has recently alluded to the fact that the ease with which the current High Court can use international human rights as

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[53] (1992) 176 CLR 1, 37–38.

[54] *Id.* 38; McHugh J at 74 says that the validity of domestic legislation is not dependent on consistency with a Convention to which Australia is a party.

[55] (1992) 175 CLR 1, 42.

[56] Such a principle could aptly be referred to as constitutional common law or a principle of constitutionalism.

[57] Gerry Simpson has suggested that this reformulated common law rule sits uneasily with international law because it is still justified by occupation rather than conquest: 'Mabo, International Law, *Terra Nullius* and the Stories of Settlement: An Unresolved Jurisprudence' (1993) 19 *Melbourne University Law Review* 195.

[58] Including in this term the notion of constitutional common law.

justification in legal reasoning is in large part due to the foresight of Murphy J, who embraced the globalisation theme much earlier than his judicial contemporaries.[59]

Having ascertained the judicial pronouncements of the High Court, the task that remains is to determine what they actually prescribe.

ANALYSING THE CASE LAW

The judgments in *Dietrich* suggest that international law can influence the further development (does this include the replacing?) of existing common law or be used as a guide in purposive statutory interpretation. It is clear that the majority of judges show some measure of support for the view that international law cannot be used to introduce/create a new principle of common law. International law is only to be used to perfect what we already have, not to create anew.[60]

For example, in *Dietrich* the majority of judges found there did not currently exist an absolute right to legal counsel at public expense.[61] Thus, those judges decided that the use of international law to advocate such a right was not appropriate. However, it would seem likely that Mason CJ and McHugh and Toohey JJ were willing to confirm (as a result of existing international law) their as yet unformulated views, that a right to a fair trial requires the trial judge to properly exercise a discretion to adjourn the trial if, in the circumstances of the case, lack of representation would lead to injustice.[62]

Deane J, in advocating the view that a right to a fair trial in the case of a serious offence (exceptional circumstances aside) always includes a right to legal representation, stated his reliance on international law.[63] However, Deane J did not purport to formulate a new common law rule, but rather to further define/develop a pre-existing one — namely, the right to a fair trial. It could be said that Deane J was developing the existing rule to such an extent that what he was doing was tantamount to formulation of a new principle of common law. This argument, although quite

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[59] M. Kirby, 'Lionel Murphy and the Power of Ideas' (1993) 18 ALT LJ 253, 256–7. For examples of Murphy J's resort to international human rights law as an influence on the common law, see *Dugan v Mirror Newspapers Ltd* (1979) 142 CLR 583; *McInnis v The Queen* (1979) 143 CLR 575. Kirby J has also been an active campaigner for more domestic recognition of international human rights: M. Kirby, 'The Australian Use of International Human Rights Norms: From Bangalore to Balliol — A view from the Antipodes' (1993) 16 *UNSW Law Journal* 363. This article by Kirby J recites the *Bangalore Principles* and canvasses generally the use of international law by Australian courts.

[60] (1992) 177 CLR 292, 306 per Mason CJ and McHugh J, 322 ff. per Brennan J, 349 per Dawson J, and 360 per Toohey J.

[61] The absolute right to counsel was discussed by the judges in terms of the right to a fair trial: *id.* 306 ff. per Mason CJ and McHugh J, 321 ff. per Brennan J, 349 per Dawson J, 360 per Toohey J, cf. Deane J at 337 and Gaudron J at 372–4.

[62] *Id.* 300, 307 per Mason CJ and McHugh J.

[63] *Id.* 337 per Deane J and 373 per Gaudron J.

technical, would be along the lines that the presumptive nature of Deane J's approach was fundamentally different from the context-dependent nature of the existing fair trial doctrine, and therefore something completely new was being advocated.

Gaudron J clearly advocates the introduction of a new principle of common law, as she is willing to overrule *McInnis v The Queen*.[64] However, Gaudron J was not filling a gap in the common law (creating law *ab initio*); rather, she was substituting a new rule for an old one, the new one being influenced by international law. Although Gaudron J does not take the use of international law to the point of creating a new common law obligation where none stood before, she is using international law to create anew within the existing body of common law. A fine distinction between the approaches of Deane and Gaudron JJ (besides the actual content of their rules) is that Deane J creates a new rule within the body of the common law but does not replace an old rule, whereas Gaudron J does.

More interestingly, though, is Gaudron J's use of international law as a reason for overruling a previous High Court decision.[65] It is only by implication that she uses international law to influence her formulation of the new obligation. Therefore, it may be argued that Gaudron J is using international law as a means for proving substantive wrongness in prior decisions or that she is using it in the process of determining the weight of various precedential reasons.[66]

In summary, and in the context of the common law, *Dietrich* suggests that:

1. per Mason CJ and McHugh J (assuming without deciding), and Toohey J: international law will be used to resolve uncertainty and ambiguity in the common law[67] and that this covered the explication of the right to a context-dependent fair trial principle;
2. per Deane J: international law will be used to define a new (and fundamentally different limb) of existing common law (which perhaps Mason CJ and McHugh J would describe as the introduction of a new common law right);
3. per Gaudron J: international law will be used:
   (a) as one of many reasons in deciding whether a previous High Court decision should be overruled;
   (b) as a guide for the new common law rule which replaces the existing rule.

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[64] (1979) 143 CLR 575.

[65] On this issue of overruling and the notions of substantive wrongness and precedential reasons, see B. Horrigan, 'Toward a Jurisprudence of High Court Overruling' (1992) 66 ALJ 199.

[66] *Id.* 209–14.

[67] Dawson J would come close to inclusion in this category, although he did express an unresolved concern over the use of international law to remove uncertainty in the common law: (1992) 177 CLR 292, 349.

Brennan J, in using the words 'legitimate influence on the development of the common law' in the context of what he said and did in *Mabo v Queensland (No. 2)*,[68] appears to support the approach likely to be taken by Mason CJ and McHugh and Toohey JJ, and would seem certain to embrace the approach of Gaudron J. Sir Anthony Mason, having used similar words in an extracurial address[69] and having concurred with Brennan J's judgment in *Mabo*, could very well in future cases support the approach of using international law, like Brennan and Gaudron JJ, as a justification for overruling. For that matter, it would seem very likely that a majority of the current High Court Justices[70] would embrace this approach.

A general conclusion to be drawn from *Dietrich* is that the present High Court will use international human rights as an indicator of the performance of our current common law, but as yet they are far from embracing the notion that these norms apply automatically in domestic litigation. At this stage, all that can be suggested with confidence is that international law is likely to be used by the High Court as a factor in deciding when and how to *replace*[71] common law. The filling of gaps in the common law,[72] the creating of new (as opposed to replacement) common law,[73] and the invalidation of statutes on the basis of international human rights are issues of the moment but ones on which the court is yet to show its hand, although *Dietrich* does indicate that a conservative response might be expected from the majority of judges. In Brennan J's Dixon-influenced rhetoric, the 'strict logic' of legal reasoning does not allow the unconditional acceptance of international norms in order to generate new common law obligations.[74] Brennan J (along with Mason CJ and Dawson, Toohey and McHugh JJ[75]) seems to be suggesting that international human rights are only of weight when the obligation is already

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[68] (1992) 175 CLR 1.

[69] Sir Anthony Mason, 'The High Court in Sir Samuel Griffth's Time: Contemporary Parallels and Contrasts', from the March 1993 NILEPA Samuel Griffith Centenary Conference in Brisbane.

[70] Remembering that McHugh J concurred with Brennan J in *Mabo* and that Deane J is attuned to the impact of global initiatives.

[71] This must connote introducing new attributes which were once prohibited, as was the case for Brennan J in *Mabo* and Gaudron J in *Dietrich*. However, if the replacement principle is introducing a fundamentally new concept to the common law, then it will not be regarded as replacing but rather introducing new law. This is the way Mason CJ and McHugh J may label Deane J's principle in *Dietrich*; new, not replacement, because it introduces a new underlying premise to the doctrine of fair trial — fairness in terms of power rather than simply in terms of presentation. Such a distinction seems ridiculous.

[72] On this notion, see (1992) 177 CLR 292, 360–1 per Toohey J.

[73] Much depends on whether the judges see the notion of 'development of the common law' including the importation of international norms into the domestic system to create entirely new obligations.

[74] (1992) 177 CLR 292, 321–2. See similar indications by Mason CJ and McHugh J at 306, Dawson J at 349 and Toohey J at 360–1.

[75] As Deane and Gaudron JJ did not have to opine on this issue, it is unclear how they would react.

found to exist in the common law and is in need of overhaul and modernising. In this sense, international human rights are seen as a 'modernising agent' of the existing common law and not as the creator of new domestic common law; that is, international human rights are not capable of enlarging the floating mass that is the common law and are only capable of reforming the internal structure of that mass. How such a distinction can be consistently maintained remains to be seen.

A FRAMEWORK FOR THE USE OF INTERNATIONAL HUMAN RIGHTS BEFORE THE HIGH COURT

The foregoing analysis of *Dietrich* gives a one-dimensional account of the way in which international human rights will be invoked in High Court jurisprudence. It will be argued here that international human rights law, in the sense that it represents principles or standards that the community aspires to uphold, must be given more consideration as a source of Australian law. The point being made is that talking of international human rights law as something separate from the law of this country is quite misleading and dangerous. Due to the unique history of Australian constitutional law, the principles upon which people constitute are left hidden and muddled. In such a state of affairs it is not so easy to reject international law as foreign or non-legitimated law, for it may well represent the principles of community that the people of this nation accept.

The first step in commencing this deeper analysis of the use of international human rights is to explore, as the following section does, the notion of judicial law-making. If judges make law, then international law has the potential to source such law and to provide fabric to our society. But what is to say that international law is an appropriate source of Australian law? The rest of this article explores this question and thereby examines the justifications available to judges, for a more extensive use of international human rights in the resolution of domestic litigation.

Judges as Law-makers

The High Court in recent times, and particularly under the leadership of Mason CJ, has displayed a willingness to reject the declaratory theory of adjudication along with literalism and legalistic interpretation techniques.[76] The current Chief Justice has suggested that 'judges do make law when they qualify, extend or reshape a principle of law'.[77] He adds:

[76] For an excellent analysis of this development, see J Doyle, 'At the Eye of the Storm' (1993) 23 *University of Western Australia Law Review* 15; see also Sir Anthony Mason, 'Future Directions in Law' (1987) *Monash Law Review* 149, 155 ff.; and Horrigan, *supra* n. 65 at 199–200.

[77] Mason, *supra* n. 76 at 158.

> It is unrealistic to interpret any instrument ... by word alone without any regard to fundamental values. By values I mean those that are accepted by the community rather than those personal to the judge.[78]

Brennan J, in *Dietrich*, explains that the judiciary do update and repair the defects of the common law but only so as to keep the common law current in the context of 'contemporary values of the community'. He explains that 'contemporary values' which justify judicial development of the common law are not transient or inspired by an interest group's campaign but are the 'relatively permanent values of the Australian community.'[79] Brennan J states that 'a concrete example of contemporary values is given by Article 14(3)(d) of the *ICCPR*.'[80]

To summarise, we have a trend for judges to acknowledge that they base their interpretations of texts (including the common law) upon more than the written words; community values are also part of the equation. This process involves giving meaning to the words 'community values'. As Mason CJ and Brennan J suggest, international law may provide evidence of contemporary values.

The move by the High Court away from literalism comes almost two decades after the departure from strict legalism was being advocated with popular support in such a bastion of positivism as Oxford University. Ronald Dworkin's great input into the movement from literalism to interpretivism is generally acknowledged as the seminal event in turning English and Australian jurisprudence away from strict rule-oriented analytical positivism.[81] Many judges on the High Court are no doubt influenced by the works of Dworkin, and their modern approaches demand that any person appearing before the court have at least a vague understanding of his theories. It is hard to pinpoint the educative effect Dworkin has had on our High Court, as some of them were also exposed to the

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[78] *Id.* 158–9; see also the Chief Justice's speech, 'The High Court in Sir Samuel Griffith's Time: Contemporary Parallels and Contrasts', from the March 1993 NILEPA Samuel Griffith Centenary Conference in Brisbane where in the context of explaining shifts in interpretation technique since Griffith's time he says: 'the rules of international law which declares universal fundamental rights are an important and relevant factor in the development of the common law' (at 26); Brennan J in *O'Toole v Charles David Pty Ltd* (1990) 171 CLR 232, 267.

[79] *Dietrich v The Queen* (1992) 177 CLR 292, 319.

[80] *Id.* 321.

[81] R. Dworkin, *Taking Rights Seriously* (London: Duckworth, 1977); an earlier move towards this idea in Europe is discussed in J. Kelly, *A Short History of the Western Legal System* (Oxford: Oxford University Press, 1992), 407. The Scottish jurisprudent Richard Tur of Oriel College Oxford has suggested in commenting on this part of the paper, that when discussing this move from literalism in British jurisprudence one should not forget the equally inspiring works of Hart, Twining and MacCormick, to name a few! The reason why Dworkin is singled out here is that he openly broke through the preoccupation with rules to provide an elaborate theory of adjudication, which posits rules in a context of prevailing political morality. A rejoinder, though, is that 'sophisticated positivism' (espoused in the works of Raz and more specifically MacCormick), as opposed to 'simple or strict positivism', can embrace common law principles and therefore much of the anti-positivist movement is misguided: R. Shiner, 'Dyzenhaus and the Holy Grail' (1994) 7 *Ratio Juris* 56, 58 ff.

great jurist Julius Stone who studied with Roscoe Pound. Dworkin's theory is said by some to be a more advanced elaboration of ideas formulated by Pound.[82]

As the High Court moves into a (liberal) interpretive era, legal political and philosophical theorists are in full flight towards the postmodern era or perhaps even beyond such an era. Legal theory has as a dominant theme today the notion that law is contingent upon specific events and the use of power;[83] law is lived and experienced. Gone or going are the quests for universal and rational legal truths;[84] in their place come quests for the better understanding of the exercise of power in cultural and historical settings/contexts.[85] The High Court is yet to deal with such postmodernist themes; its reference to community values as a universal truth is anathema to the trek from epistemology to hermeneutics.[86] Any advocate before the High Court should have an eye towards this paradigm shift as the postmodernist challenge knocks loudly at the court's door, while at the same time be able to fully utilise the current approach of the judges to adjudication.

Dworkin, Fish and Interpretive Theory

Dworkin's theory has emanated from a rights-based moral theory taken to the point where law is not made up of just rules but also principles that guide the application of rules.[87] Where principles conflict, their respective weights must be acknowledged.[88] Principles emanate from and are defined by the rights recognised by the prevailing political morality.[89] In short, Dworkin's theory builds from recognised moral rights general principles of law which in turn define rules of statute or common law. The

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[82] R. Cotterrell, *The Politics of Jurisprudence* (London: Butterworths, 1989), ch. 6.

[83] On the multidimensional aspect of this term, see M. Foucault, *Power/Knowledge* (Brighton: Harvester Press, 1980).

[84] See J. Balkin, 'Deconstructive Legal Practice' (1987) *Yale Law Journal* 743; J. Balkin, 'Transcendental Deconstruction, Transcendent Justice' (1994) 92 *Michigan Law Review* 1131.

[85] M. Minnow, 'Partial Justice: Law and Minorities'. In A. Sarat and T. Kearns (eds), *The Fate of Law* (Ann Arbor: University of Michigan Press, 1992). Feminist theory, critical legal studies and critical race theory are also part of current legal theory. CLS flowered in the 1980s and presented strong criticism of the formalism and objectivism of law. Formalism being a doctrine that contrasts law and politics: R. Unger, 'Critical Legal Studies' (1983) *Harvard Law Review* 561. Feminist and race theory deal with issues of gender and racial discrimination respectively. They are indicative of a growing awareness in legal theory of the discriminating or 'otherness' effect of law. Dworkin's theory, although it may appear as progressive to some, is open to criticism from all three schools of thought. The High Court seems to be embracing some strands of these theories but the road is long!

[86] R. Rorty, *Philosophy and the Mirror of Nature* (Princeton: Princeton University Press, 1979), ch. VII; S. Feldman, 'Diagnosing Power: Postmodernism in Legal Scholarship and Judicial Practice' (1994) *Northwestern University Law Review* 1046, 1060 ff.

[87] Dworkin, *supra* n. 81 at 90 ff. R. Dworkin, *Law's Empire* (London: Fontana Press, 1986), 93.

[88] *Id.* 78.

[89] *Id.* 90 ff. and ch. 12.

judge's interpretive actions in this whole process must 'fit' in the best possible way what has gone before and to this extent are constrained by existing legal materials.[90]

In determining the rights of an individual, it is suggested that prevailing political morality could be gleaned from international human rights instruments. These international instruments could be used (along with other sources) to define rights and thereby generate principles which in turn will influence the definition of statute and common law. In essence, this is what the High Court appears to be doing when it refers to unimplemented international law. Where there is no domestic law conflicting with an international norm, it is arguable that the High Court Judges in practising law as integrity also acknowledge international law in the dimension of 'fit'.

Even if it be suggested that the High Court is not carrying out Dworkin's rights-based moral theory, but rather a policy-driven theory, international human rights could provide a basis for determining the policy objectives to be achieved. It is apparent that the High Court when referring to policy is not referring to Dworkin's goal-based notion of policy. The High Court when referring to policy seems to be talking about 'community values', which may in the end not be that much different from the content of Dworkin's rights-based moral theory, depending on whether Dworkin's rights are natural rights or social constructs.[91]

Stanley Fish, over the last decade, has developed a theory that adjudication and interpretation are one and the same practice. Law, he suggests, can only have definition in the specific instance of interpretation, and thus like a literary text can mean anything. There is a constraint on this apparently nihilistic approach, as in this theory the reader can never transcend the tradition of knowing to which he or she belongs; interpretation is constrained by interpretive communities. In the case of the law, this means the legal profession (and, in some instances, the people and/or politicians). For example, if a judge makes a decision which appears as ridiculous to the legal profession, he or she will be ostracised. The interpretive community keeps the interpreter within the boundary of perceived sensibility.[92]

Fish is an interesting theorist and perhaps provides a better explanation of the interpretive practice of the High Court than Dworkin. Fish is postmodern in approach; denying the universality of truth and reason.[93] However, the attraction of Fish is that he explains a constraint on interpretation in the postmodern framework. The Fish approach, of course,

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[90] R. Dworkin, *Law's Empire* (London: Fontana, 1986), 228–39 and see, generally, chs 6 and 7. This notion of 'fit' Dworkin sees as being generated from the virtue of political integrity (at 166) which underpins his idea of law as integrity (at 224–5).

[91] On this point, see N. MacCormick, *Legal Right and Social Democracy* (Oxford: Oxford University Press, 1982), ch. 7.

[92] On Fish generally, see *Is There a Text in the Class* (Cambridge, Mass: Harvard University Press, 1980) and *Doing What Comes Naturally* (Oxford: Oxford University Press, 1989).

[93] S. Fish, 'Don't Know Much About the Middle Ages' (1988) *Yale Law Journal* 777.

still leaves us at the mercy of the interpretive community and their influences. Brennan J seems to anticipate the Fish approach by continually reinforcing the notion of constraints on judges; one being community values.[94]

International law can make up part of a judge's justification for deciding a case and thus provide evidence of sensibility so as to placate the interpretive community. Deane and Gaudron JJ both justify their actions in part on the basis of international law.[95] Are they using international law as a justification for their interpretations to their interpretive communities?

In summary, law as interpretation depends on cultural and moral context and underlying community standards to give it life. International law, due to the internationalisation of community, in part provides (and evidences) this context and must be seen in human rights litigation as an integral part of the interpretive process. If we reject the universality of international human rights in the name of cultural relativism, then the interpretive process can eschew international rights in defining local tradition; however, the people of the world have not chosen to do this, at least in international fora.[96]

In *Dietrich*, though, the majority of judges while wishing to use international law in the practice of interpreting the existing common law text evidence a desire not to expand that text through international law as principle or justification.[97] Such an attitude seems restrictive, especially in an instance where international law represents prevailing morality or justifications acceptable to an interpretive community. In such a situation, the court might break free of the *Dietrich* limitations and embrace more fully international human rights in the context of a deficient common law. The fact that the desired result could be achieved in *Dietrich* without doing this left the judges a soft option and the people of Australia wondering when those globally recognised rights will be invoked to break new ground and, more importantly, to liberate individuals from oppression. In the end, it is clear that the majority in *Dietrich* would use international law as part of the interpretive process, but only to clarify the precepts we already have, rather than to fill gaps. The key to the future use of international law then lies in convincing the judiciary that international human rights are aspirations the Australian people wish to uphold; they are our law of constitution. The following sections seek to explain how this argument can be started.

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[94] *Dietrich v The Queen* (1992) 177 CLR 292, 319 ff.

[95] *Id.* 337 and 373 respectively.

[96] For a recent discussion of this issue in the context of the rights of children, see P. Alston, 'The Best Interests Principle towards a Reconciliation of Culture and Human Rights' (1994) 8 *International Journal of Law and the Family* 1.

[97] Deane J is the possible exception. However, his reliance on international law is one of a number of justifications and he does not clearly state that he is filling a gap in the common law.

People Govern: Representatives as Fiduciaries

One way of showing that international human rights are in substance the law of the Australian people emanates from the High Court's recent developments in the area of government accountability.

Recent High Court decisions concerning the right to freedom of speech in a public and political context contain *dicta* that people govern through representatives; people are sovereign and their representatives are there to further the interests of the people. The representatives are, in a sense, fiduciaries of the people.[98] Following such rhetoric through to Australia's involvement in international affairs, one may draw an anti-statist conclusion that international law is entered into on behalf of the people (the Executive being responsible to the Parliament) and should be directly enforceable by the people in Australia[99] (at least in the absence of domestic legislation). This notion portrays some strains of the Kantian ideal that the individual is sovereign and that states simply exist for the freedom and liberation of the individual.[100] Such an approach is yet to be adopted by the High Court,[101] but certain judges' redefinition of representative democracy raise questions for the future.[102] The *Dietrich* decision could well have been argued along these lines, but because it was not, the *ICCPR* was only indirectly relevant to the resolution of the issues in that case.

Intersecting Sovereignty and Community of Principle

Another, more structural justification for the use of international human rights in High Court legal reasoning is the notion of intersecting sovereignty.

Neil MacCormick has recently suggested that the UK Parliament is no longer sovereign over every issue of human life. He has advocated an

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[98] Mason CJ in *ACTV Pty Ltd v Commonwealth* (1992) 177 CLR 106, 137–8 and Deane and Toohey JJ in *Nationwide News Pty Ltd v Wills* (1992) 177 CLR 1, 71 ff.; see also *Report into the Commercial Activities of the Government of Western Australia (1992)* Part II, where government is spoken of in terms of the *'trust principle'*.

[99] C. Vazquez, 'Treaty-Based Rights and Remedies of Individuals' (1992) *Columbia Law Review* 1082. Alternatively, one could adopt the approach of Einfield J in *Minister for Foreign Affairs and Trade v Magno* (1992) 112 ALR 529, 569–74, where he says that if Parliament has evidenced enough of an intention to incorporate international human rights into domestic law, then it is legitimate for courts to use the international rights to fill any perceived lacunae in common or statutory law. This is a very interesting idea and one which is worthy of support; however, the approach advocated here and supported by government according to the trust principle seems to have much stronger ramifications for the utilisation of international human rights.

[100] F. Teson, 'The Kantian Theory of International Law' (1992) 92 *Columbia Law Review* 53.

[101] The Full Federal Court recently gave some measure of support for this view: *Teoh v Minister for Immigration, Local Government and Ethnic Affairs* (1994) 121 ALR 436.

[102] The great stumbling block for this approach is that traditionally utilisation of an unimplemented treaty has been seen as executive law-making. However, with the revelation in the free speech cases that people govern the notion of executive law-making in this context is put in a different light.

approach which might best be termed 'intersecting sovereignty'.[103] In this approach, neither the UK Parliament nor the EC Parliament is the absolute power holder over the other; each entity shares sovereignty.[104]

MacCormick traces the evolution of such an idea, impliedly suggesting it is born out of an economic and social dependence. The idea is futuristic and one that is hard to fit into traditional Diceyan and Austinian approaches to law and sovereignty. There is an attraction in the idea, though, as the sovereignty of one entity is not always the answer to good government.

The MacCormick approach concedes sovereignty to another body or bodies when community of principle[105] is evidenced on a wider basis than the boundaries of the relevant domestic state. In other words, MacCormick sees the unification of thought on one issue as justifying regulation by a body which overarches that community of principle.

Perhaps international human rights portray a community of principle regarding rights (some developing nations would question their current content) and therefore, on MacCormick's thesis, economic and social dependence demands that we relinquish sovereignty over human rights to the international legal order.

MacCormick's theory is not just Kelsen's monism or European federalism rehearsed; it is a complex theory of intersecting sovereignty. We are possibly not there yet, but as MacCormick suggests, it may only be our imagination stopping us from moving to such a position. This type of theory, if adopted, would require the High Court to be much more protective towards international human rights.

Although the MacCormick theory awaits development, it in part helps an understanding of why international human rights could be used to influence the development of the common law. They arguably represent a community of principle; a desire to maintain a standard of human dignity and thus the High Court should be willing to promote them at least as much as it feels it can legitimately do so.[106] This reasoning was not

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[103] 'Sovereignty' here is meant to denote state sovereignty over territory as accorded by international law. The notion of 'parliamentary sovereignty' is also relevant to and implied in the term 'sovereignty' in this instance, as the British state evidences its state sovereignty in part through legislation made pursuant to the notion of parliamentary sovereignty.

[104] N. MacCormick, 'Beyond the Sovereign State' (1993) 56 *Modern Law Review* 1.

[105] A concept used by Ronald Dworkin in explaining his 'true fraternal mode of association': *Law's Empire* (London: Fontana, 1986), 213–14.

[106] For a stimulating discussion of this community of principle in the EC in terms of the liberal theory of international law, see A.M. Burley, 'International Law and International Relations Theory' (1993) 87 AJIL 205, especially at 233–5. Burley argues from a descriptive and normative viewpoint that liberal democratic values (which are transnational) are the way to secure peace and freedom. Although still firmly committed to the 'state', she sees the support of liberal values such as fundamental rights by domestic courts as important. See B. Fitzgerald, 'Theorising about International Law through the Liberal Paradigm' in *Proceedings of the Second Annual Meeting of the Australian and New Zealand Society of International Law* (Centre for International and Public Law, ANU, 1994), 179.

advanced in *Dietrich*, yet if it were, and the court accepted it, international law would have had a more direct influence on the case.

Eunomia: The Argument for a Global Community

The final justification for the use of international human rights in High Court reasoning is the notion of a global community.

Philip Allott, an English jurist, has put forward a theory of a global community which will act for the good of the people of the world. In this global community, state sovereignty is made redundant.[107] He writes:

> Governments are generating an International Rule of Law, whilst still conceiving of themselves as masters of the Rule of Power. In the phantoms of international constitutionalism and international law-making are the seeds of an international society which is a society.[108]

For Allott, the new global society is imminent, and once it arrives the people of the world will be accorded human rights; states will have no say in their enforcement. In fact, in the new society, states will be replaced by international organisations or interest groups that are not necessarily tied to any particular territory.

Any regional local or similar-type court in such a structure would be bound to apply the international norm. In such a structure, there would be no High Court of Australia but rather a judicial body which would act as an agent of the international community.

Allott's theory is idealistic and perhaps unworkable, but it is a theory that brings home the point to domestic legal reasoning and the dispensation of justice, that human rights are global issues and it is for the good of the people of the world that they be respected. While the High Court still acts out the charade of the 'rule of power' by using international law as a modernising agent for the common law in cases such as *Mabo*, the question must be asked: why are these human rights which receive global recognition such a good thing to use as a modernising agent? The answer must be that in the 'phantoms of international constitutionalism and international law-making' lies a commitment in the form of community values of the people of Australia to the globalisation of community, especially in terms of human rights.

In the end, Allott's theory is vital to our reconciliation of any international versus domestic issues; in the end, it comes down to the notion of the commitment of the Australian people to international initiatives. Allott's theory makes it clear that the High Court must discern the will of the people and their commitment to global initiatives in adopting the influence and advice of international laws. If the 'best interests of the

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[107] The theory is put forward in P. Allott, *Eunomia* (Oxford: Oxford University Press, 1990).
[108] *Id.* 317.

people' is the touchstone of our political society, then the court must be active in inquiring into the global themes that will flourish with world-wide support. It is not so much the source of law, or the local response that will eventually matter, but more the content of this international law which describes in turn the commitment of the peoples of the world. Allott's theory, if taken seriously, would underpin a doctrine where the High Court would invalidate statute law that contravened international initiatives, in pursuit of the best interests of the people. The bottom line is whether we accept globalisation as a good or bad thing, and whether we see it as affecting 'community values'. If they are evidenced by international law, then it is to that body of law that the court must turn in the context of human rights, in order to build the principles of constitutionalism that reflect our commitment to community.[109]

This justification in essence takes the themes of the previous two sections and moulds them into a much stronger idea. If this justification had been invoked in *Dietrich*, resort to international law would probably have been unconditional.

The concepts of intersecting sovereignty and global community, while not expressly endorsed by the court, do find some support in the judgments of Deane and Gaudron JJ. When these two judges refer to the *ICCPR*, they appear to talk about it reflecting the values of the Australian people.[110] Likewise, Brennan J in *Mabo* talks of 'the expectations of the international community according with Australian values'.[111] If this rhetoric, as it appears to, is embracing the notion of community of principle beyond state borders, then global values can and should be more persuasively argued for in the future.[112]

CONCLUSION: THE TOUCHSTONE OF THE PEOPLE

The use of international human rights by the High Court will no doubt expand in years to come as the Australian people search for meaningful principles of constitutionalism.[113] As we enter, more and more, the 'global tradition', our perceptions of constituting are likely to mirror international human rights.

Until the legislature decides to explain our charter of rights, the High Court will, as the highest appellate court in this 'local', be faced with the task of giving life to international initiatives in the domestic legal system.

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[109] Sir Anthony Mason has recently said that '... the courts are institutions which belong to the people and that the judges exercise their powers for the people': Sir Anthony Mason, 'The Role of the Courts at the Turn of the Century' (1993) 3 JJA 156, 166.

[110] (1992) 177 CLR 292, 337 and 373 respectively.

[111] (1992) 175 CLR 1, 42.

[112] Under the emerging liberal theory of international law, domestic courts of liberal democracies are duty bound to uphold liberal values: see *supra* n. 106.

[113] Comparative law is also an important influence in this area, as it is to law generally.

Basic answers as to why it should do this and as to why international law should be supported have been given in the foregoing arguments.

Ultimately, though, a true appreciation of the role and legitimate use of international human rights in domestic litigation is dependent upon the recognition of an emerging and fundamental principle of constitutionalism, namely 'the people'.[114] It is the people who generate constitutionalism and it is the people that we must focus on in this trek towards community of principle in the shape of global human rights.

[114] Support for such a principle, which was anticipated by M.J. Detmold in *The Australian Commonwealth* (Sydney: Law Book Co. Ltd, 1985), is found in the judgments of Mason CJ, Deane and Toohey JJ in the free political speech cases of *ACTV Pty Ltd v Commonwealth* (1992) 177 CLR 106 and *Nationwide News Pty Ltd v Wills* (1992) 177 CLR 1; see also Deane J in *Theophanous v Herald & Weekly Times Ltd* (1994) 124 ALR 1.